

**United States Department of Energy
Office of Hearings and Appeals**

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| In the Matter of Personnel Security Hearing |) | |
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| Filing Date: | October 31, 2017 | Case No.: PSH-17-0076 |
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Issued: March 9, 2018

Administrative Judge Decision

Kimberly Jenkins-Chapman, Administrative Judge:

This Decision concerns the eligibility of XXXX XXXX XXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the individual’s access authorization should be restored.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. In April 2017, as part of a background investigation, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the individual to address concerns about his alcohol use. In addition to the PSI, the LSO requested the individual’s medical records and recommended a psychological evaluation of the individual by a DOE consultant psychologist (DOE psychologist). The DOE psychologist examined the individual in June 2017 and memorialized his findings in a report (Psychological Report). According to the DOE psychologist, the individual has an emotional, mental or personality condition or conditions that can continue to impair judgment, reliability or trustworthiness. He further concluded that the individual has a tendency to avoid being candid and to misconstrue facts, noting that these tendencies can, and have, significantly impaired the individual’s reliability and trustworthiness.

¹ Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

In September 2017, the LSO sent a letter (Notification Letter) advising the individual that it possessed reliable information that created substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of one or more security concerns under Guideline I (Psychological Conditions) of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective June 8, 2017 (Adjudicative Guidelines).

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Administrative Judge in this case. At the hearing that I convened, the individual presented his own testimony and that of six witnesses. The DOE Counsel called one witness, the DOE psychologist. Both the DOE and the individual submitted a number of written exhibits (Ex.) prior to the hearing.

II. Regulatory Standard

Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the regulations require me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. §710.7(a). The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "will not endanger the common defense and security, and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

III. The Notification Letter and the Security Concerns at Issue

As previously mentioned, the Notification Letter included a statement of derogatory information that raised concerns about the individual's eligibility for access authorization. The information in

the letter specifically cites Guideline I of the Adjudicative Guidelines. Guideline I concerns psychological conditions and provides that “[c]ertain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness.” Guideline I at ¶ 27. As support for invoking Guideline I, the Notification Letter cites the report of the DOE psychologist which concluded that the individual has an emotional, mental or personality condition or conditions that can continue to impair judgment, reliability or trustworthiness. Ex. 1. The DOE psychologist further concluded that the individual has a tendency to avoid being candid and to misconstrue facts. He stated that these tendencies can, and have, significantly impaired the individual’s reliability and trustworthiness. *Id.*

In light of the information available to the LSO, the LSO properly invoked Guideline I.

IV. Findings of Fact

On November 9, 2009, the individual was subjected to a breathalyzer test administered by his employer which registered a result of .06. During a subsequent November 2009 PSI, he admitted to consuming a pint of rum the night before the breathalyzer test. Ex. 3. As a result of the positive breathalyzer test, the individual’s security clearance was suspended and he was referred to a DOE consultant psychologist for an evaluation. *Id.* In his December 2009 report, the DOE psychologist concluded that the individual used alcohol habitually to excess and should permanently abstain from alcohol. During a 2010 personnel security hearing, the individual testified that he had abstained from alcohol, was committed to attending Alcoholic Anonymous (AA) indefinitely, and had no interest in ever drinking again. Consequently, the individual’s clearance was restored on August 12, 2010. *Id.*

As part of a reinvestigation, the individual was interviewed during a PSI conducted on April 12, 2017. During the PSI, the individual admitted that after having his clearance restored, he began consuming alcohol again sometime around 2010.² *Id.* He further admitted that, from that time to the present, he has consumed alcohol on average once a month at special events or meetings. Specifically, the individual stated that he consumes two to three 12-ounce beers in 30 minutes to one hour. *Id.* He stated that he does not drink to intoxication and does not drink to the point of any impairment. *Id.* The individual further indicated that he decided to resume drinking because he did not believe he was an alcoholic, and did not believe that an occasional drink once a month to every few months would cause any issues for him. *Id.* He reiterated that he did not drink to excess and does not believe the frequency or rate of his current consumption is concerning. *Id.*

During the course of his April 2017 PSI, the individual was confronted with statements he made during his 2010 personnel security hearing expressing his intent to abstain from future alcohol use. *Id.* He explained that, at that time, it was his intent to abstain from alcohol use and that he did so for a period of six months and throughout the administrative review process. *Id.* However, the individual stated that he proved to himself that he could stop drinking, control his consumption, and show that he had no need for alcohol. *Id.* He also stated that he was never instructed that he could not drink at all. *Id.* The individual further indicated that he stopped attending AA meetings because he did not believe he fit the profile of an alcoholic. *Id.* Finally, during his 2017 PSI, the

² During the hearing, the individual clarified that he did not resume drinking alcohol on an occasional basis until about 2012. Tr. at 113.

individual stated that his future intention is to continue having an occasional drink once every few months. He indicated that, in light of the PSI, he will consider total abstinence of alcohol if instructed to do so. *Id.*

Based on this information, the individual was referred to the DOE psychologist for a psychological evaluation. On June 9, 2017, the DOE psychologist evaluated the individual. In his Report, he concluded that the individual does not have an alcohol use disorder or does not habitually or binge consume alcohol to the point of impaired judgment. Ex. 4 at 10. He further concluded that the individual has not had an alcohol use disorder for approximately the last eight years. According to the DOE psychologist, the individual has been modestly drinking between one and three drinks a month to one drink every few months. He stated that while there is some suggestion that his consumption may exceed those amounts, the amount of excess appears relatively small and indicative of self-control. The DOE psychologist further concluded that the individual's phosphatidylethanol (PEth) test, which indicates excessive alcohol consumption within the 60 days prior to the test, supports his not drinking to excess. *Id.*

However, the DOE psychologist determined that the individual did possess a mental or personality condition that can continue to impair his judgment, reliability and trustworthiness. He specifically stated that the individual has "demonstrated a tendency to make commitments to DOE that he has reversed or spoken of in contradictory way. When a hearing was held to review his reformation [the individual] stated commitments meant to assure the judge that he was never again going to be a security problem because he was never again going to drink. His involvement in AA, when he returned to drinking and even how much he now drinks have been so inconsistently stated that the facts are obscure." *Id.* Finally, the DOE psychologist concluded that the individual has a tendency to avoid being candid and to misconstrue facts, and that these tendencies can, and have, significantly impaired the individual reliability and trustworthiness. *Id.*

V. Analysis

I have thoroughly considered the record in this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c)³ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should be restored. Based on the facts in this record, I find that restoring the individual's DOE security clearance will not endanger the common defense and security, and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

At the hearing, the individual testified that during his 2010 personnel security hearing, he stated that he would abstain from alcohol and would attend AA. Transcript of Hearing (Tr.) at 105. He

³ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

further stated that he intended to remain sober because it was important to him and to his life. *Id.* He testified that he attended AA after his 2010 hearing and provided documentary evidence to substantiate his attendance for a two-year period. *Id.*, Ex. C. According to the individual, his “heart” was in AA and he found it to be very useful. Tr. at 107. He testified that his Employee Assistance Program (EAP) counselor supported his continued participation in AA as long as he found it useful, and stated that he continued participating in AA for over two years. *Id.* at 108. However, when asked why he stopped attending AA, the individual stated that most of the twelve steps in AA involve a higher power or a willingness to acknowledge the influence God. *Id.* The individual explained that he is agnostic and “didn’t feel necessarily that [he] could buy into those steps,” but found it interesting and useful to hear and share stories. *Id.* According to the individual, he ultimately stopped attending because he believed he understood it, and knew that if he needed assistance later, he could always go back to attend the meetings. *Id.*

The individual further testified that on November 9, 2009, he was issued a Fitness for Duty letter as a consequence of his clearance being suspended. *Id.* at 109. The letter outlined certain temporary work restrictions including that the individual should abstain from alcohol, participate in and complete any prescribed treatment programs, participate in any unannounced alcohol testing and not drive any government or private vehicles on official business. *Id.* at 110. The individual testified that he complied with all of the work restrictions. *Id.* He further testified that on July 22, 2010, he was notified that the Fitness for Duty evaluation process was complete and that all of his work-related restrictions had been lifted. *Id.* at 111, Ex. B. According to the individual, he remained abstinent and attended AA for about two years, until sometime in 2012, before he began intermittent drinking, such as having an occasional drink with dinner. *Id.* at 113.

When asked whether he believed he was being disingenuous or improper to start drinking again after stating his intentions two years earlier, the individual acknowledged that he stated his intention to remain abstinent for a lifetime, but believed at the time that the overriding concern was a commitment to avoid drinking to excess. *Id.* at 114. The individual testified that he wanted to know if he could “really do this,” and stated that he never went beyond consuming a drink or two, which did not seem unreasonable to him at the time. *Id.* at 114. When asked about his current drinking habits during his 2017 reinvestigation, the individual stated that he has a drink with dinner maybe once a month. *Id.* at 115. The individual stated that he was taken by surprise that his alcohol use was a concern when asked about it during his 2017 PSI. *Id.* at 118. Finally, the individual testified that he never lied or attempted to deceive the DOE when he stated that he would completely abstain from alcohol in 2010, but rather that was his intention at the time. *Id.* at 189. He reiterated that for about a two-year period, he underwent drug testing 47 times, received his two-year pin for his AA attendance and completely abstained from alcohol. *Id.* The individual stated that he has completely abstained from alcohol since April 2017.

The individual offered the testimony of his EAP counselor who has worked as an EAP counselor for 32 years. The EAP counselor explained that his primary duties involve the assessment of individuals with alcohol or substance abuse issues, with specialized training in mental health counseling. *Id.* at 11, 12. He testified that he provided EAP counseling to the individual beginning in 2009 for alcohol use, and had about 21 counseling sessions with the individual at that time. *Id.* at 15. Based on his interactions with the individual, he believed the individual was truthful and candid with him, and that the individual intended to abstain from alcohol. *Id.* at 19. The EAP

counselor, who also testified at the individual's administrative hearing in 2010, stated that the individual had demonstrated a pattern of abstinence in 2010 and believed that at the time he intended to abstain from alcohol. He further testified that he was aware that the individual was found fit for duty, with no work restrictions, including any restriction stating that he should continue to abstain from alcohol. *Id.* at 21.

The EAP counselor further testified that he met with the individual about seven times in 2017 and was aware of his 2017 reinvestigation. *Id.* at 22. With respect to the reinvestigation, he indicated that the individual was confused about whether there was a concern regarding his alcohol or his promise to abstain from drinking. *Id.* at 23. At the time, the individual relayed that he had disclosed during his background interview that he had resumed drinking intermittently. *Id.* When asked whether he was concerned that the individual had started drinking again, the EAP counselor testified that he was not concerned because the individual had been sober for several years and had maintained his sobriety, noting that the individual had described to him what he was drinking and how he was drinking. *Id.* He opined that after interacting with the individual for a total of 27 hours (including the 2009 and 2017 sessions), he did not notice any personality or behavioral aspects that would lead him to question the individual's judgment. *Id.* at 25. He believes the individual is capable of being a controlled drinker, and believes he is a reliable and trustworthy person. *Id.* at 27. He reiterated that the individual was honest and candid with him, and he did not believe that the individual was trying to be manipulative when he stated that he intended to abstain from alcohol during his 2010 administrative hearing, but rather was sincere in his testimony at the time. *Id.* at 35. Finally, he testified that he agrees with the DOE psychologist that the individual does not have an alcohol issue, but does not believe the individual lacks good judgment or reliability. *Id.* at 31.

The individual also offered the testimony of his psychologist who has worked for about 10 years performing security and fitness for duty evaluations. She testified that she evaluated the individual on January 18, 2018, and conducted two-and-a-half hour psychological testing. *Id.* at 146, Ex. J and K. Based on her evaluation and testing of the individual, she opined that the individual does not suffer from an emotional, mental or personality condition that impairs his judgment, reliability or trustworthiness. *Id.* at 148. She explained that the results of the three tests that she administered to the individual, the MMPI-2, SASSI-3 and the Paulhus Deception Scale, have built-in objective validity scales which can look at a person's test-taking attitude and whether they are trying to put their best foot forward or ignore some of their own shortcomings. *Id.* at 149. According to the psychologist, the individual scored within normal limits on all three tests. *Id.* at 152-155. While she agreed that the individual had an alcohol issue in 2010 which he rehabilitated, and she was aware of the individual's promise to abstain from alcohol forever, she did not believe that the individual's current social drinking makes him unreliable. *Id.* at 156,157. Specifically, she opined that the individual's social drinking and failure to fulfil his promise do not indicate that he has an emotional condition that impairs his judgment and reliability. *Id.* at 158. She further noted that the individual self-reported his intermittent drinking. *Id.* at 167. According to the psychologist, she believes the fact that the individual promised to abstain from alcohol, and then made a decision that he could safely drink socially, is not a "behavioral dysfunction" or "particularly deviant," but rather common human behavior, and not indicative of psychopathology. *Id.* at 163, 164.⁴

⁴ The individual also offered the testimony of three additional witnesses, three colleagues who all testified that the individual is an honest, reliable and trustworthy individual.

After listening to the hearing testimony, the DOE psychologist testified that he is not concerned that the individual resumed intermittent alcohol consumption, but rather with the commitment he made in 2010 and whether or not the individual can be believed. *Id.* at 195. He testified that he is particularly concerned with the individual's misrepresentation about his alcohol consumption during his 2017 PSI and during the DOE psychologist's evaluation regarding when exactly he resumed social drinking. *Id.* The DOE psychologist further testified that he believes the individual makes statements to get himself out of difficulty when it is a personal issue, and does not believe that the individual was simply flustered when he made inconsistent statements during his PSI. *Id.* at 198. The DOE psychologist reiterated that the individual's trustworthiness is impaired. *Id.*

Guideline I – Psychological Conditions

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. *See* Guideline I at ¶ 27. Furthermore, there are a number of conditions that could mitigate the security concerns under this Guideline, including that 1) there is a recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation, and 2) there is no indication of a current problem. *Id.* at 29 (a) and (e). Here, while the DOE psychologist believes that the individual still possesses a mental condition that impairs his judgement and reliability, there are two mental health professionals, the individual's EAP counselor as well as his psychologist, who opine that the individual does not have a current problem or condition.

At the hearing, the individual credibly testified that he was sincere with his intention to abstain from consuming alcohol which he made during his 2010 administrative hearing. He also credibly demonstrated that he maintained his sobriety for a two-year period and attended AA regularly during this time period. Also, he testified that after about a two-year period of time he believed that AA was no longer a good fit for him and that he could safely resume the occasional consumption of alcohol. I found the individual's testimony in this regard to be candid and forthcoming. While there are some variances in the individual's 2017 PSI regarding how much alcohol he drank (*i.e.*, two to three drinks once a month in one statement, and one beer a month in another statement), I find the individual's testimony regarding these inconsistencies to be honest. As stated earlier, he testified that he was confused or got flustered during his interviews. Furthermore, the distinction between the amounts of alcohol claimed in the two statements is not substantial. Therefore, I am not convinced that the individual intentionally sought to misrepresent facts during his PSI. Moreover, I am persuaded by the testimony of the EAP counselor and the individual's psychologist that the individual does not possess a mental condition that impairs his judgment and reliability. I found the testimony of these two mental health professionals -- the EAP counselor who has had over 27 hours of interaction with the individual, as well as the psychologist who conducted extensive psychological testing of the individual -- to be more persuasive. I further conclude that their testimony is consistent with the witness testimony and my observations in the case.

For these reasons, I find that the individual has sufficiently resolved the DOE's security concerns under Guideline I.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised serious security concerns under Guideline I. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the individual has brought forth convincing evidence to adequately resolve the security concerns associated with Guideline I. I therefore find that restoring the individual's access authorization would not endanger the common defense and security, and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Administrative Judge
Officer of Hearings and Appeals